

# A New Twist on False Advertising Lawsuits

MANUFACTURERS HAVE FACED AN ONSLAUGHT OF FALSE ADVERTISING LAWSUITS IN RECENT YEARS AND FOOD COMPANIES ARE NO EXCEPTION.

Some very well-known companies have had to endure the cost and embarrassment of such litigation. A recent decision from the Ninth Circuit Court of Appeals is likely to place retailers, including food retailers, squarely in the path of this accelerating trend.

## Food Manufacturers and False Advertising Claims

Food manufacturers, which can include retailers who market their own private label brands, are often accused of skirting the line between traditional advertising and “mislabeling,” which can give rise to false advertising liability.

Under California’s broad consumer protection statutes, including the Consumer Legal Remedies Act, the Unfair Business Practices Act, and the False Advertising Act, manufacturers and retailers can be held responsible for a variety of remedies, including disgorgement of profits, restitution, injunctive relief, and treble damages.

Misstatements in food labeling have recently become the target of well-funded plaintiffs’ attorneys who see deep pockets behind food and beverage companies, and who seem willing to exploit the slightest misstatement as false advertising. Campbell Soup, Naked Juice, Johnson & Johnson, ConAgra, and Chobani are among the larger manufacturers that have already been targeted.

The threat, however, is not limited to these market giants; smaller producers are also feeling the impact. Our firm recently settled a claim while defending a local food producer who used seemingly innocuous statements on its packaging to advertise its organic products.

The cost and possible negative publicity of false advertising lawsuits often force companies to settle rather than defend their advertising.

For example, in 2011, Naked Juice was sued in a class action for allegedly mislabeling its drinks as “100% Juice,”

“All Natural,” containing “All Natural Fruit,” and being “Non-GMO.”

While Naked Juice adamantly denied that its advertising claims were false and after defending the litigation for nearly two years, the company settled, agreeing to pay \$9 million to the class members, establish a product verification program to ensure GMO containing ingredients are minimized, hire a quality control manager, and establish a database that permits electronic tracking and verification of product ingredients for the Naked Juice line.

*Food manufacturers, which can include retailers who market their own private label brands, are often accused of skirting the line between traditional advertising and “mislabeling,” which can give rise to false advertising liability.*

Campbell Soup Company and the American Heart Association were recently named as defendants in a class action in New Jersey related to the soup maker’s statements that its products have “lower sodium” and contain a “healthy level of sodium.” It remains to be seen how Campbell’s will react to this litigation.

## Retailers and False Advertising Claims

As Kohl’s Department Stores recently learned, retailers now face an increased risk of lawsuits for “price” false



John C.  
McCarron



Spencer W.  
Christensen



advertising. Kohl's is being accused of advertising a product as being "on sale" when the price did not actually reflect a discount.

In *Hinojos v. Kohl's Corp.*, the Plaintiff purchased luggage and some clothing at the "sale" price advertised by Kohl's. He then sued alleging that he would not have purchased the products if he had known the sale price was not a true discount and sought damages for false advertising.

In determining whether the plaintiff had suffered any economic injury, and therefore had standing to sue under California's consumer protection statutes, the Ninth Circuit Court of Appeals stated that "price advertisements matter."

The court found that retailers have "an incentive to lie to their customers by falsely claiming that their products have previously sold at a far higher original price in order to induce customers to purchase merchandise at a purportedly marked-down sale price."

The court found that the plaintiff had suffered economic injury and that such advertising is both misleading and effective. This decision is likely to open the door to many more false advertising cases against retailers.

There are many legal strategies and defenses available if a company finds itself accused of false advertising. But to minimize the risks of litigation, manufacturers and retailers are advised to revisit their packaging claims and advertising practices to make sure they comply with California and Federal law. ■

John C. McCarron and Spencer W. Christensen are attorneys in the Food & Ag Practice at Downey Brand, LLP, in Sacramento, California. John and Spencer focus their practices in the area of commercial litigation specifically representing food producers, processors and retailers. Both John and Spencer have experience defending food manufacturers and producers in class action litigation related to false advertising.



**Growth is multicultural**

We drive business growth by providing the most powerful and comprehensive understanding of multicultural consumers' shopping and viewing behaviors.

We will bring you our innovative retail solutions to increase your ROI.

**nielsen**  
an uncommon sense of the consumer.<sup>™</sup>

www.nielsen.com

Copyright © 2013 The Nielsen Company. All rights reserved. Nielsen and the Nielsen logo are trademarks or registered trademarks of C277ACN Trademarks, LLC. 09000813



**FSI**  
FINANCIAL SUPERMARKETS, INC.  
supermarketbank.com

**us bank**

**In-Store Banking Offers...**

- Convenience
- Rental income
- Increased security
- Higher customer count
- Improved cash flow
- Larger profits
- A partner promoting your store

**For more information, call 800.992.4978**




We hope you **"Like"** us!

To "Like" our Facebook page, log-on to Facebook and search "California Grocers Association"

**CGA has a Facebook page we hope you "Like"!**

When you "Like" CGA's Facebook page you'll stay on top of the latest news and events in California's robust grocery industry. News, trends, updates, and more are in-store when you join CGA's Facebook community.

For more information, or questions, contact Dave Heylen, CGA, at (916) 448-3545.

